

Arizona's Open Meeting Law

Liz Hill

Assistant Ombudsman – Public Access
September 22, 2009

Role of the State Ombudsman

A.R.S. § 41-1376.01

- Investigate complaints relating to open government.
- Train public officials and educate the public on the rights of the public under the public access laws.

2

Role of the Attorney General's Office

- Open Meeting Law Enforcement Team (OMLET)
 - Investigate complaints
 - Enforcement authority
- Education
 - Arizona Agency Handbook, Chapter 7
 - Available online: www.azag.gov

3

Legislative Intent

- Maximize public access to the governmental process.
- Open deliberations and proceedings to the public.
- Prevent public bodies from making decisions in secret.
- Resolve any uncertainty in favor of openness.

4

Who Must comply?

- "Public Bodies" – A.R.S. § 38-431(6)
- Includes
 - Standing committee
 - Special committee
 - Advisory committee
 - Subcommittee
 - of or appointed by the public body

5

2007 Amendment!

- A.R.S. § 38-431 (went into effect 9/19/07)
- Defines advisory committee or subcommittee -
 - Any entity, however designated, officially established on motion or order of a public body or presiding officer of a public body
 - Whose members are appointed for specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body

6

What Must a Public Body Do?

- A.R.S. § 38-431.01
 - ☐ Notice
 - ☐ Agenda
 - ☐ Meet and take legal action in public meetings.
 - ☐ Allow public to observe (Except authorized executive session.)
 - ☐ Minutes

7

What is a Meeting?

- A.R.S. § 38-431(4)
- "Meeting" is a gathering, in person or through technological devices
- of a quorum of a public body
- to:
 - ☐ Discuss
 - ☐ Propose
 - ☐ Deliberate
 - ☐ Take legal action

8

Quorum?

- Majority of the public body – A.R.S. § 1-216(B)
(unless specific statutory provision specifies a different number)
 - ☐ 7 members
 - quorum = 4
 - ☐ 5 members
 - quorum = 3
- Includes vacancies

9

The "Initial" Notice

- A.R.S. § 38-431.02
- Tells public where meeting notices will be posted.
 - Secretary of state – state public bodies (currently charter schools file with the Secretary of State)
 - Clerk of the board of supervisors – county, school districts and special districts
 - Clerk of the city or town or mayor's office - city or town

10

Notice of Meeting

Contents

- The name of the public body
- Date, Time, and Place
 - Address and room number



11

Notice of Meeting

A.R.S. § 38-431.02(C)

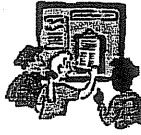
- Posted 24 hours in advance of meeting
 - To all members of the public body
 - To the general public

Exceptions:

1. Can recess and resume a properly noticed meeting to a later date by making an announcement at the meeting and describing what agenda items will be covered
2. Actual emergencies

12

Posting the Notice



- Must be posted in a location where the public has reasonable access.
- Make sure it can't be borrowed.
- Make sure front and back can be read.

13

Proof of Posting

- Someone should document when the notice/agenda was posted
- Need a regular, routine business practice
 - ☐ Clerk marks time of posting with initials
 - ☐ Date / time stamp at exact time of posting

14

Additional Notice / Cities and Towns

- All public bodies shall give additional notice that is reasonable and practicable
- For cities and towns that have an internet site:
 - ☐ Shall post public notices on website
 - ☐ Technical problems with the internet will not preclude holding a meeting if other requirements are met

15

Social Events



- If more than a quorum may be present
- 1. Not required, but you can post a "courtesy agenda" announcing social event where a quorum may be present
- 2. Include statement that no business of the public body will be discussed & no action will be taken
- 3. Don't discuss board business

16

The Agenda

A.R.S. § 38-431.02(H)

- Must list the specific matters to be discussed, considered or decided at the meeting.
- Must contain information reasonably necessary to inform the public.
- Public body may discuss, consider or make decisions only on
 - ☐ matters listed on the agenda and
 - ☐ other matters related thereto

17

Common Agenda Problems

- Using language a regular person would not understand
 - ☐ Legalese
 - ☐ Acronyms
 - ☐ Technicalese
- Using general categories without details
 - ☐ "New Business"
 - ☐ "Old Business"
 - ☐ "Personnel"
 - ☐ "Reports"

18

Current Events

A.R.S. § 38-431.02(K)

- Chief administrator, presiding officer or a member of a public body may present a brief summary of current events without listing in the agenda the specific matters to be summarized
- provided that
- "Current Events" is an agenda item
- & public body does not propose, discuss, deliberate or take legal action

19

Meeting Location Pitfalls

- Inaccessible
 - ☐ A board member's house
 - ☐ Country club
- Inaudible
- Too small for a controversial meeting
 - ☐ Recess and resume
 - ☐ Leave a staff person to give directions
 - ☐ Post a large notice
 - ☐ Start the meeting a little later

20

Virtual Meetings

- You may have a meeting through the Internet or other online medium.
- So long as the public body:
 - ☐ Provides clear notice
 - ☐ Facilitates access
 - ☐ Takes minutes
 - ☐ Creates a document retention policy to govern all documents created
- See Ariz. Att'y Gen. Opinion 108-008

21

Public's Rights

- Attend
- Listen
- Tape record
- Videotape



Note: Public body cannot require attendees to identify themselves or sign in (unless they are making a presentation)

22

Public has NO Right to:

- Speak
- Disrupt



Practical Pointer:

- ☐ make a good record of warnings
- ☐ Video or audio tape can be your friend

23

Calls to the Public

A.R.S. § 38-431.01(H)

- Optional
- Time, manner, place restrictions
 - ☐ Can limit time (egg timer)
 - ☐ Ban Repetition
 - May require speakers on the same side with no new comments to select spokesperson
 - ☐ prohibit disruptive behavior



24

Common Pitfall of Calls to the Public

- Discussing matters not listed on the agenda.
- Public body's response is limited to:
 - ☐ Direct staff to study the matter
 - ☐ Ask that a matter be placed on a future agenda
 - ☐ Respond to criticism

Note: Responses must take place at the **conclusion** of the call to the public!

25

Meeting Etiquette

- Asking for trouble:
 - ☐ Passing notes (even if it's about when to order lunch)
 - ☐ Whispering to fellow board members
 - ☐ Quorum talking to individuals before the meeting officially starts or after the meeting officially ends.

26

Executive Sessions

Only certain subject are allowed (A.R.S. § 38-431.03(A))

- Personnel matters
- Confidential records
- Legal advice
- Litigation, contract negotiations, and settlement discussions
- Employee salary discussions
- International, Interstate, and Tribal Negotiations
- Purchase, Sale or Lease of Real Property

27

Executive Sessions

- Just because you CAN have one, should you?
- Public suspicion vs. actual need



28

Executive Session Agendas

- Only a general description is necessary
- Needs to be more than a statutory citation
- Should include the statutory section authorizing the executive session
- Need not contain information that would:
 - ☐ Defeat the purpose of the executive session
 - ☐ Compromise the legitimate privacy interests of a public officer, appointee, or employee
 - ☐ Compromise the attorney-client privilege

29

Who may attend executive sessions - A.R.S. § 38-431(2)

- Members of public body
- Persons subject to a personnel discussion
- Auditor general
- Individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities
 - ☐ Clerk to take minutes/run tape
 - ☐ Attorney to give legal advice

Tip: Put on the record why certain staff are reasonably necessary.

30

Executive Session Pitfalls

- What happens in executive session stays in executive session!
- Failure to advise persons about the confidentiality requirement A.R.S. § 38-431.03(C) - mandatory
- Taking legal action. All votes must take place in public!



31

Personnel Matters

- Provide written notice to employee at least 24 hours before meeting.
- Employee may require meeting be held in public (does not include salary discussions).
- Employee does not have the right to attend executive session, but may. (Regardless, employee has access to portion of executive session meeting minutes.)

32

Common Questions

Q: *May you conduct personnel evaluations in executive session?*

A: Yes. See Ariz. Att'y Gen. Op. 196-012

Q: *May a board interview applicants in executive session?*

A: Yes, if position is one appointed by the board.
See Ariz. Att'y Gen. Op. 183-050.

Note: Must vote for appointment in public session

33

Confidential Information

- Discussion or consideration of records exempt by law from public inspection
- Can receive and discuss information and testimony that state or federal law requires to be maintained as confidential
- Discussion may occur in open session when confidential information is adequately safeguarded (i.e. use initial for medical patients)

34

Legal Advice



- Discussion or consultation for legal advice with attorneys of the public body
 - Lawyers for the PUBLIC BODY
 - Not lawyers for someone else
 - Not just because lawyer is present
 - Avoid factual "updates"

35

NOT Allowed

- **Discussion regarding the merits**
 - Once the members of the public body commence discussion regarding the merits or what action to take based upon the attorneys' advice, the discussion moves beyond the realm of legal advice and **must be open to the public.**

36

That includes...

- Debate over what action to take
- pros and cons
- policy implications of competing alternative courses of action

All of the above must take place in public

37

Minutes

A.R.S. § 38-431.01(B)

- Minutes or recording required
 - ☐ Caution: Pursuant to A.R.S. § 39-101, permanent records must be on paper.
 - ☐ Tape recordings – must be retained for at least 3 months!

38

Content of Public Meeting Minutes

1. Date, time and place of meeting
2. Members present & absent
3. General description of matters considered
4. Accurate description of legal action
5. Names of members who propose each motion
6. Names of persons, as given, making statements or presenting material to the public body; and
7. A reference to the legal action about which they made statements or presented material

39

Access to Public Meeting Minutes

- Minutes or a recording shall be open to public inspection 3 working days after the meeting
- NOT AFTER APPROVAL – no requirement in the OML to approve minutes

40

Executive Session Meeting Minutes

- Shall have written minutes or a recording
 - ☐ Burden of proof – *Fisher* case
- Shall include the following:
 - ☐ Date, time and place of meeting
 - ☐ Members present & absent
 - ☐ General description of matters considered
 - ☐ An accurate description of all instructions given
 - ☐ Such other matters as deemed appropriate by the public body
- Shall be kept confidential (A.R.S. § 38-431.03(B))



Access to Executive Session Meeting Minutes

- Meeting minutes of executive session shall only be released to:
 - ☐ Members of the public body
 - ☐ Officers, appointees, or employees who were the subject of discussion or consideration (only that portion)
 - ☐ Auditor general in connection with an audit
 - ☐ County attorney, attorney general or ombudsman when investigating alleged violations

42

Circumvention



- Cannot use any device to circumvent the law.
- "Splintering the quorum":
 - Serial communications (verbal, written, electronic, etc.)
 - Polling
 - "Hub and Spokes" of a wheel analogy
 - "Daisy Chaining"

43

Prohibited 2-way communications

- Discussing
- Deliberating
- Taking Legal Action
- Back and forth among a quorum
- On a matter that could foreseeably come before the board (board business)

44

Serial Communications - May Violate OML

- Verbal serial communications – going from one person to the next, sharing communications would violate OML
 - *Arizona Agency Handbook* § 7.5.2



45

Non-verbal Serial Communications

- Letters - series of letters from one member to the next would violate OML
- E-mail – occurring at different times will still constitute a “meeting” in violation of the OML
 - Simultaneity is not required for there to be a “meeting”

46

Attorney General Opinion I05-004: E-mail

- Attorney General's website www.azag.gov
- Board members cannot use e-mail to circumvent the OML
- Cannot use e-mail among a quorum to:
 - Propose legal action
 - Discuss legal action
 - Deliberate on legal action
 - Take legal action

47

E-mail Communications

- E-mail communications are treated the same as any other form of communication between board members.
- E-mails exchanged among a quorum of the Board that involve discussion, deliberations, or taking legal action on matters that may come before the Board constitute a meeting and thus violate the open meeting law.

48

For example:

- You have a 5 member board
- One member sends an e-mail to 2 members and there's a response shared among all 3
- You now have a discussion among three members = a quorum
- Violation

49

Facts vs. Opinion?

- There is **no distinction** between discussing facts vs. discussing opinions among a quorum
- Deliberation = "collective acquisition and exchange of facts preliminary to a final decision"
- Therefore, 2-way discussion of facts (among quorum) regarding potential board business = violation

50

Board might consider...

- a statement on e-mail that provides:
"To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other members of the Board. Members of the Board may reply to this message, but they should not send a copy of their reply to other members."

51

Staff E-mail

- Staff may send e-mail to board members.
- Passive receipt of information from staff, without more, does not violate the open meeting law.
Example: board packets
- Staff may NOT send opinion or substantive communication about board business from a board member to enough other members to constitute a quorum.

52

Communications with the Media

- The open meeting law does not prohibit a member of a public body from speaking to the media regarding matters that may come before the public body.
 - A.R.S. § 38-431.09(B) added by 2008 Session Laws, Ch. 135, § 1 (effective 9/26/08)
 - Attorney General Opinion I07-013

53

Prohibited 1-Way Communication

- Proposing legal action
- "Propose" – means "to put forward for consideration, discussion, or adoption."
- It only takes 1 person to propose legal action
- CANNOT propose legal actions outside of a noticed meeting

54

Proposing an Agenda Item?

- Proposing an item for the agenda does not propose legal action
- **"without more"**
- i.e. be cautious – communicate the TOPIC only
- NOT the legal action you want the board to take

55

"Propose" – EXAMPLES in the Opinion

- "Councilperson Smith was admitted to the hospital last night"
 - Does NOT propose legal action
- "We should install a crosswalk at First and Main"
 - Does propose legal action
 - It's more than a topic for the agenda because it urges or suggests an outcome

56

Now, you try these:

- "Here's the recipe for the lemon bars I brought to the last meeting."
- "I hope I can count on all of you to vote in favor of agenda item 5."

57

More examples:

- "Here's an article on a program the State of Oregon has put in place."
- "We need to adopt a program like the one discussed in the attached article."

58

More Examples

- "I think we should consider firing the Executive Director at our next meeting."
- "I would like to discuss the Executive Director's performance at our next meeting."

59

Staff & Other Persons

- Cannot direct staff to communicate in violation of the open meeting law – A.R.S. § 38-431.01(I)
- Sanctions may be imposed upon any person who knowingly aids, agrees to aid or attempts to aid another person in violating this article – A.R.S. § 38-431.07(A).

60

When in Doubt?



- RESOLVE ALL DOUBTS IN FAVOR OF OPENNESS.
- Remember: legal action taken during a meeting held in violation of any provision of the open meeting law is null and void unless ratified.

61

Ratification – A.R.S. § 38-431.05

- Within 30 days after discovery of the violation or when should have been discovered with reasonable diligence
 - *Tanque Verde Unified School Dist. v. Bernini*, 206 Ariz. 200, 76 P.3d 874 (App. 2003) (30 days after court ruling OK)

62

Ratification Continued...

- Notice 72 hours before the meeting
 - Description of action to be ratified
 - Clear statement that the body proposes to ratify a prior action
 - Information on how to obtain detailed written description of the action
 - Written description includes:
 - Action to be ratified
 - All of the preceding deliberations, consultations and decisions that preceded and related to the action
 - Must be included in minutes

63

Attorney General Opinion I08-001 Re: Ratification

- If one agenda item is improper, the remainder of agenda is most likely valid.
- If improper item involves entire agenda/notice/meeting, all actions will be invalid.

64

Penalties - A.R.S. § 38-431.07(A)

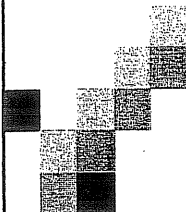
- Members and any persons who aid, attempt, or agree to aid -
 - Civil penalty up to \$500 for each violation
 - Such equitable relief as the court deems appropriate
 - Reasonable attorneys' fees
- If intent to deprive the public of information –
 - Court may remove public officer from office and
 - Charge officer and any person that aided, agreed to aid, or attempted to aid, all the costs and attorney's fees

65

Key Resources

- Ombudsman Publications
- Ombudsman website www.azoca.gov
- Department of Library, Archives, and Public Records www.lib.az.us
- Title 2, Chapter 3, Article 3 of the Arizona Administrative Code (A.A.C. R2-3-301 et seq.)
- Arizona Agency Handbook, Chapter 6, www.azag.gov
- Case law
- Attorney General Opinions www.azag.gov or <http://azmemory.lib.az.us/>

66



Arizona's Open Meeting Law

Liz Hill
Assistant Ombudsman – Public Access
September 22, 2009

Role of the State Ombudsman

A.R.S. § 41-1376.01

- Investigate complaints relating to open government.
- Train public officials and educate the public on the rights of the public under the public access laws.

2

Role of the Attorney General's Office

- Open Meeting Law Enforcement Team (OMLET)
 - Investigate complaints
 - Enforcement authority
- Education
 - Arizona Agency Handbook, Chapter 7
 - Available online: www.azag.gov

3

Legislative Intent

- Maximize public access to the governmental process.
- Open deliberations and proceedings to the public.
- Prevent public bodies from making decisions in secret.
- Resolve any uncertainty in favor of openness.

4

Who Must comply?

- "Public Bodies" – A.R.S. § 38-431(6)
- Includes
 - Standing committee
 - Special committee
 - Advisory committee
 - Subcommittee
 - of or appointed by the public body

5

2007 Amendment!

- A.R.S. § 38-431 (went into effect 9/19/07)
- Defines advisory committee or subcommittee -
 - Any entity, however designated, officially established on motion or order of a public body or presiding officer of a public body
 - Whose members are appointed for specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body

6

What Must a Public Body Do?

- A.R.S. § 38-431.01
 - ☐ Notice
 - ☐ Agenda
 - ☐ Meet and take legal action in public meetings.
 - ☐ Allow public to observe (Except authorized executive session.)
 - ☐ Minutes

7

What is a Meeting?

- A.R.S. § 38-431(4)
- "Meeting" is a gathering, in person or through technological devices
- of a quorum of a public body
- to:
 - ☐ Discuss
 - ☐ Propose
 - ☐ Deliberate
 - ☐ Take legal action

8

Quorum?

- Majority of the public body – A.R.S. § 1-216(B)
(unless specific statutory provision specifies a different number)
 - ☐ 7 members
 - quorum = 4
 - ☐ 5 members
 - quorum = 3
- Includes vacancies

9

The "Initial" Notice

- A.R.S. § 38-431.02
- Tells public where meeting notices will be posted.
 - Secretary of state – state public bodies (currently charter schools file with the Secretary of State)
 - Clerk of the board of supervisors – county, school districts and special districts
 - Clerk of the city or town or mayor's office - city or town

10

Notice of Meeting

Contents

- The name of the public body
- Date, Time, and Place
 - Address and room number



11

Notice of Meeting

A.R.S. § 38-431.02(C)

- Posted 24 hours in advance of meeting
 - To all members of the public body
 - To the general public

Exceptions:

1. Can recess and resume a properly noticed meeting to a later date by making an announcement at the meeting and describing what agenda items will be covered
2. Actual emergencies

12

Posting the Notice



- Must be posted in a location where the public has reasonable access.
- Make sure it can't be borrowed.
- Make sure front and back can be read.

13

Proof of Posting

- Someone should document when the notice/agenda was posted
- Need a regular, routine business practice
 - Clerk marks time of posting with initials
 - Date / time stamp at exact time of posting

14

Additional Notice / Cities and Towns

- All public bodies shall give additional notice that is reasonable and practicable
- For cities and towns that have an internet site:
 - Shall post public notices on website
 - Technical problems with the internet will not preclude holding a meeting if other requirements are met

15

Social Events



- If more than a quorum may be present
- 1. Not required, but you can post a "courtesy agenda" announcing social event where a quorum may be present
- 2. Include statement that no business of the public body will be discussed & no action will be taken
- 3. Don't discuss board business

16

The Agenda

A.R.S. § 38-431.02(H)

- Must list the specific matters to be discussed, considered or decided at the meeting.
- Must contain information reasonably necessary to inform the public.
- Public body may discuss, consider or make decisions only on
 - matters listed on the agenda and
 - other matters related thereto

17

Common Agenda Problems

- Using language a regular person would not understand
 - Legalese
 - Acronyms
 - Technicalese
- Using general categories without details
 - "New Business"
 - "Old Business"
 - "Personnel"
 - "Reports"

18

Current Events

A.R.S. § 38-431.02(K)

- Chief administrator, presiding officer or a member of a public body may present a brief summary of current events without listing in the agenda the specific matters to be summarized
- provided that
- "Current Events" is an agenda item
- & public body does not propose, discuss, deliberate or take legal action

19

Meeting Location Pitfalls

- Inaccessible
 - A board member's house
 - Country club
- Inaudible
- Too small for a controversial meeting
 - Recess and resume
 - Leave a staff person to give directions
 - Post a large notice
 - Start the meeting a little later

20

Virtual Meetings

- You may have a meeting through the Internet or other online medium.
- So long as the public body:
 - Provides clear notice
 - Facilitates access
 - Takes minutes
 - Creates a document retention policy to govern all documents created
- See Ariz. Att'y Gen. Opinion 108-008

21

Public's Rights

- Attend
- Listen
- Tape record
- Videotape



Note: Public body cannot require attendees to identify themselves or sign in (unless they are making a presentation)

22

Public has NO Right to:

- Speak
- Disrupt



Practical Pointer:

- ☐ make a good record of warnings
- ☐ Video or audio tape can be your friend

23

Calls to the Public

A.R.S. § 38-431.01(H)

- Optional
- Time, manner, place restrictions
 - ☐ Can limit time (egg timer)
 - ☐ Ban Repetition
 - May require speakers on the same side with no new comments to select spokesperson
 - ☐ prohibit disruptive behavior



24

Common Pitfall of Calls to the Public

- Discussing matters not listed on the agenda.
- Public body's response is limited to:
 - Direct staff to study the matter
 - Ask that a matter be placed on a future agenda
 - Respond to criticism

Note: Responses must take place at the **conclusion** of the call to the public!

25

Meeting Etiquette

- Asking for trouble:
 - Passing notes (even if it's about when to order lunch)
 - Whispering to fellow board members
 - Quorum talking to individuals before the meeting officially starts or after the meeting officially ends.

26

Executive Sessions

Only certain subject are allowed (A.R.S. § 38-431.03(A))

- Personnel matters
- Confidential records
- Legal advice
- Litigation, contract negotiations, and settlement discussions
- Employee salary discussions
- International, Interstate, and Tribal Negotiations
- Purchase, Sale or Lease of Real Property

27

Executive Sessions

- Just because you CAN have one, should you?
- Public suspicion vs. actual need



28

Executive Session Agendas

- Only a general description is necessary
- Needs to be more than a statutory citation
- Should include the statutory section authorizing the executive session
- Need not contain information that would:
 - Defeat the purpose of the executive session
 - Compromise the legitimate privacy interests of a public officer, appointee, or employee
 - Compromise the attorney-client privilege

29

Who may attend executive sessions - A.R.S. § 38-431(2)

- Members of public body
- Persons subject to a personnel discussion
- Auditor general
- Individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities
 - Clerk to take minutes/run tape
 - Attorney to give legal advice

Tip: Put on the record why certain staff are reasonably necessary.

30

Executive Session Pitfalls

- What happens in executive session stays in executive session!
- Failure to advise persons about the confidentiality requirement A.R.S. § 38-431.03(C) - mandatory
- Taking legal action. All votes must take place in public!



31

Personnel Matters

- Provide written notice to employee at least 24 hours before meeting.
- Employee may require meeting be held in public (does not include salary discussions).
- Employee does not have the right to attend executive session, but may. (Regardless, employee has access to portion of executive session meeting minutes.)

32

Common Questions

Q: *May you conduct personnel evaluations in executive session?*

A: Yes. See Ariz. Att'y Gen. Op. 196-012

Q: *May a board interview applicants in executive session?*

A: Yes, if position is one appointed by the board. See Ariz. Att'y Gen. Op. 183-050.

Note: Must vote for appointment in public session

33

Confidential Information

- Discussion or consideration of records exempt by law from public inspection
- Can receive and discuss information and testimony that state or federal law requires to be maintained as confidential
- Discussion may occur in open session when confidential information is adequately safeguarded (i.e. use initial for medical patients)

34

Legal Advice



- Discussion or consultation for legal advice with attorneys of the public body
 - Lawyers for the PUBLIC BODY
 - Not lawyers for someone else
 - Not just because lawyer is present
 - Avoid factual "updates"

35

NOT Allowed

- **Discussion regarding the merits**
 - Once the members of the public body commence discussion regarding the merits or what action to take based upon the attorneys' advice, the discussion moves beyond the realm of legal advice and **must be open to the public.**

36

That includes...

- **Debate** over what action to take
- **pros and cons**
- **policy implications** of competing alternative courses of action

All of the above must take place in public

37

Minutes

A.R.S. § 38-431.01(B)

- Minutes or recording required
 - **Caution:** Pursuant to A.R.S. § 39-101, permanent records must be on paper.
 - Tape recordings – must be retained for at least 3 months!

38

Content of Public Meeting Minutes

1. Date, time and place of meeting
2. Members present & absent
3. General description of matters considered
4. Accurate description of legal action
5. Names of members who propose each motion
6. Names of persons, as given, making statements or presenting material to the public body; and
7. A reference to the legal action about which they made statements or presented material

39

Access to Public Meeting Minutes

- Minutes or a recording shall be open to public inspection **3 working days** after the meeting
- NOT AFTER APPROVAL – no requirement in the OML to approve minutes

40

Executive Session Meeting Minutes

- Shall have written minutes or a recording
 - Burden of proof – *Fisher* case
- Shall include the following:
 - Date, time and place of meeting
 - Members present & absent
 - General description of matters considered
 - An accurate description of all instructions given
 - Such other matters as deemed appropriate by the public body
- Shall be kept confidential (A.R.S. § 38-431.03(B))



Access to Executive Session Meeting Minutes

- Meeting minutes of executive session shall only be released to:
 - Members of the public body
 - Officers, appointees, or employees who were the subject of discussion or consideration (only that portion)
 - Auditor general in connection with an audit
 - County attorney, attorney general or ombudsman when investigating alleged violations

42

Circumvention



- Cannot use any device to circumvent the law.
- "Splintering the quorum":
 - Serial communications (verbal, written, electronic, etc.)
 - Polling
 - "Hub and Spokes" of a wheel analogy
 - "Daisy Chaining"

43

Prohibited 2-way communications

- Discussing
- Deliberating
- Taking Legal Action
- Back and forth among a quorum
- On a matter that could foreseeably come before the board (board business)

44

Serial Communications - May Violate OML

- Verbal serial communications – going from one person to the next, sharing communications would violate OML
 - *Arizona Agency Handbook § 7.5.2*



45

Non-verbal Serial Communications

- Letters - series of letters from one member to the next would violate OML
- E-mail – occurring at different times will still constitute a “meeting” in violation of the OML
 - Simultaneity is not required for there to be a “meeting”

46

Attorney General Opinion I05-004: E-mail

- Attorney General's website www.azag.gov
- Board members cannot use e-mail to circumvent the OML
- Cannot use e-mail among a quorum to:
 - Propose legal action
 - Discuss legal action
 - Deliberate on legal action
 - Take legal action

47

E-mail Communications

- E-mail communications are treated the same as any other form of communication between board members.
- E-mails exchanged among a quorum of the Board that involve discussion, deliberations, or taking legal action on matters that may come before the Board constitute a meeting and thus violate the open meeting law.

48

For example:

- You have a 5 member board
- One member sends an e-mail to 2 members and there's a response shared among all 3
- You now have a discussion among three members = a quorum
- Violation

49

Facts vs. Opinion?

- There is **no distinction** between discussing facts vs. discussing opinions among a quorum
- Deliberation = "collective acquisition and exchange of facts preliminary to a final decision"
- Therefore, 2-way discussion of facts (among quorum) regarding potential board business = violation

50

Board might consider...

- a statement on e-mail that provides:
"To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other members of the Board. Members of the Board may reply to this message, but they should not send a copy of their reply to other members."

51

Staff E-mail

- Staff may send e-mail to board members.
- Passive receipt of information from staff, without more, does not violate the open meeting law.
Example: board packets
- Staff may NOT send opinion or substantive communication about board business from a board member to enough other members to constitute a quorum.

52

Communications with the Media

- The open meeting law does not prohibit a member of a public body from speaking to the media regarding matters that may come before the public body.
 - A.R.S. § 38-431.09(B) added by 2008 Session Laws, Ch. 135, § 1 (effective 9/26/08)
 - Attorney General Opinion I07-013

53

Prohibited 1-Way Communication

- Proposing legal action
- "Propose" – means "to put forward for consideration, discussion, or adoption."
- It only takes 1 person to propose legal action
- CANNOT propose legal actions outside of a noticed meeting

54

Proposing an Agenda Item?

- Proposing an item for the agenda does not propose legal action
- **“without more”**
- i.e. be cautious – communicate the TOPIC only
- NOT the legal action you want the board to take

55

“Propose” – EXAMPLES in the Opinion

- “Councilperson Smith was admitted to the hospital last night”
 - Does NOT propose legal action
- “We should install a crosswalk at First and Main”
 - Does propose legal action
 - It’s more than a topic for the agenda because it urges or suggests an outcome

56

Now, you try these:

- “Here’s the recipe for the lemon bars I brought to the last meeting.”
- “I hope I can count on all of you to vote in favor of agenda item 5.”

57

More examples:

- "Here's an article on a program the State of Oregon has put in place."
- "We need to adopt a program like the one discussed in the attached article."

58

More Examples

- "I think we should consider firing the Executive Director at our next meeting."
- "I would like to discuss the Executive Director's performance at our next meeting."

59

Staff & Other Persons

- Cannot direct staff to communicate in violation of the open meeting law – A.R.S. § 38-431.01(I)
- Sanctions may be imposed upon any person who knowingly aids, agrees to aid or attempts to aid another person in violating this article – A.R.S. § 38-431.07(A).

60

When in Doubt?



- RESOLVE ALL DOUBTS IN FAVOR OF OPENNESS.
- Remember: legal action taken during a meeting held in violation of any provision of the open meeting law is null and void unless ratified.

61

Ratification – A.R.S. § 38-431.05

- Within 30 days after discovery of the violation or when should have been discovered with reasonable diligence
 - *Tanque Verde Unified School Dist. v. Bernini*, 206 Ariz. 200, 76 P.3d 874 (App. 2003) (30 days after court ruling OK)

62

Ratification Continued...

- Notice 72 hours before the meeting
 - Description of action to be ratified
 - Clear statement that the body proposes to ratify a prior action
 - Information on how to obtain detailed written description of the action
 - Written description includes:
 - Action to be ratified
 - All of the preceding deliberations, consultations and decisions that preceded and related to the action
 - Must be included in minutes

63

Attorney General Opinion I08-001 Re: Ratification

- If one agenda item is improper, the remainder of agenda is most likely valid.
- If improper item involves entire agenda/notice/meeting, all actions will be invalid.

64

Penalties - A.R.S. § 38-431.07(A)

- Members and any persons who aid, attempt, or agree to aid -
 - Civil penalty up to \$500 for each violation
 - Such equitable relief as the court deems appropriate
 - Reasonable attorneys' fees
- If intent to deprive the public of information -
 - Court may remove public officer from office and
 - Charge officer and any person that aided, agreed to aid, or attempted to aid, all the costs and attorney's fees

65

Key Resources

- Ombudsman Publications
- Ombudsman website www.azoca.gov
- Department of Library, Archives, and Public Records www.lib.az.us
- Title 2, Chapter 3, Article 3 of the Arizona Administrative Code (A.A.C. R2-3-301 et seq.)
- Arizona Agency Handbook, Chapter 6, www.azag.gov
- Case law
- Attorney General Opinions www.azag.gov or <http://azmemory.lib.az.us/>

66

OPEN MEETING LAW 101

Arizona's Open Meeting Law in a Nutshell

Information compiled by:
Liz Hill, Assistant Ombudsman – Public Access

Two core concepts

“All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.” A.R.S. § 38-431.01(A).

“It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonable necessary to inform the public of the matters to be discussed or decided.” A.R.S. § 38-431.09.

Why do we have an Open Meeting Law?

1. To protect the public.
 - a. To avoid decision-making in secret.
 - b. To promote accountability by encouraging public officials to act responsively and responsibly.
2. To protect public officials.
 - a. To avoid being excluded (notice).
 - b. To prepare and avoid being blind sided (agenda).
 - c. To accurately memorialize what happened (minutes).
3. Maintain Integrity of government.
4. Better informed citizenry.
5. Build trust between government and citizenry.

What constitutes a meeting?

A meeting is a gathering, in person or through technological devices of a quorum of a public body at which they discuss, propose or take legal action, including deliberations. A.R.S. § 38-431(4). This includes telephone and e-mail communications.

Who must comply with Open Meeting Law?

Public bodies. "Public body" means the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body. A.R.S. § 38-431(6).

"Advisory committee" or "subcommittee" means any entity, however designated, that is officially established, on motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body. A.R.S. § 38-431(1).

What is Required under the Open Meeting Law?

1. Notice

The open meeting law requires at least 24 hours notice to the members of the public body and the general public. A.R.S. § 38-431.02(C).

Notice must be posted in the public place identified in the disclosure statement and by giving additional notice as is reasonable and practicable. A.R.S. § 38-431.02(A).

2. Agenda

Agendas must contain information reasonably necessary to inform the public of the matters to be discussed or decided. A.R.S. § 38-431.09.

Agendas must be available at least 24 hours before the meeting. A.R.S. § 38-431.02(G).

3. Public's Rights

The public has a right to:

- Attend
- Listen
- Tape record
- Videotape

Public has no right to:

- Speak
- Disrupt

4. Calls to the Public

An open call to the public is an agenda item that allows the public to address the public body on topics of concern within the public body's jurisdiction, even though the topic is not specifically included on the agenda. Ariz. Att'y Gen. Op. I99-006.

Although the Open Meeting Law permits the public to attend public meetings, it does not require public participation in the public body's discussions and deliberations and does not require a public body to include an open call to the public on the agenda. *See* Ariz. Att'y Gen. Op. No. I78-001.

An individual public officer may respond to criticism, ask staff to review an item or ask that an item be placed on a future agenda, but he or she may *not* dialogue with the presenter or collectively discuss, consider, or decide an item that is not listed on the agenda. A.R.S. § 38-431.01(H); Ariz. Att'y Gen. Op. I99-006. Note that individual

members of the public body may respond to criticism by individuals who addressed the public body during the call to the public, but the public body may not collectively discuss or take action on the complaint unless the matter is specifically listed on the agenda. A.R.S. § 38-431.01(H).

Public bodies may impose reasonable time, place, and manner restrictions on speakers. Restrictions must be narrowly tailored to affect a compelling state interest and may not be content based. Ariz. Att'y Gen. Op. I99-006.

A member of the public body may not knowingly direct a staff member to communicate in violation of the Open Meeting Law. A.R.S. 38-431.01(I).

In sum:

- *Calls to the public are permitted, but not required.*
- *Should be added as an agenda item.*
- *Public body may limit speaker's time.*
- *Public body may require speakers on the same side with no new comments to select spokesperson*
- *Public body may set ground rules:*
 - *civility*
 - *language*
 - *treat everyone the same*

5. Executive Sessions

Public bodies may hold private executive sessions under a few limited circumstances. In executive sessions, the public is not allowed to attend or listen to the discussions, and the public body is not permitted to take final action. A.R.S. § 38-431.03(D).

Members of the public body may not vote or take a poll in executive sessions. A.R.S. § 38-431.03(D).

There are seven authorized topics for executive sessions:

1. Personnel (must provide 24 hours written notice to employee).
2. Discussion or consideration of records exempt by law from public inspection.
3. Legal advice – with public body's own lawyer(s).
4. Discussion or consultation with public body's lawyer(s) to consider pending or contemplated litigation, settlement discussions, negotiated contracts.
5. Discuss and instruct its representative regarding labor negotiations.
6. Discuss international, interstate, and tribal negotiations.
7. Purchase, sale, or lease of real property.

Notice and Agenda: Agendas for executive sessions may describe the matters to be discussed more generally than agendas for public meetings in order to preserve confidentiality or to prevent compromising the attorney-client privilege. A.R.S. § 38-

431.02(I). Nonetheless, the agenda must provide more than a recital of the statute that authorizes the executive session.

6. Minutes (A.R.S. §§ 38-431.01(B), (C), (D) and -431.03(B))

Public bodies must take meeting minutes of all meetings, including executive sessions.

May be recorded or written, keeping in mind that permanent records must be on paper.

Public session meeting minutes must include:

- Date, time and place of meeting;
- Names of members of the public body present or absent;
- A general description of matters considered; and
- An accurate description of all legal actions proposed, discussed or taken, and the names of members who propose each motion. The minutes shall also include the names of the persons, as given, making statements or presenting material to the public body and a reference to the legal action about which they made statements or presented material.

Executive session minutes must include:

- Date, time and place of meeting;
- Names of members of the public body present or absent;
- A general description of matters considered;
- An accurate description of all instructions given; and
- Such other matters as may be deemed appropriate by the public body.

The minutes or a recording of the public session must be open for public inspection no later than three working days after the meeting, except as otherwise provided in the statute. A.R.S. § 38-431.01(D).

Cities and towns with a population of more than 2,500 persons must post approved city and town council minutes on its website within two working days following approval. A.R.S. § 38-431.01(E)(2).

Minutes of executive sessions must be kept confidential except from certain individuals. A.R.S. § 38-431.03(B).

How long meeting minutes are maintained is determined by the public body's record retention and destruction schedule authorized by Arizona State Library and Archives.

Persons in attendance may record any portion of a public meeting, as long as the recording does not actively interfere with the meeting. Acceptable recording equipment includes tape recorders, cameras, or other means of reproduction. A.R.S. § 38-431.01(F).

7. Where to turn for help

Self-help resources available:

The Arizona Ombudsman – Citizens' Aide handbook – The Arizona Open Meeting Law
(available on line at www.azoca.gov under open meetings/publication)

The Arizona Ombudsman's website, www.azoca.gov

Arizona Agency Handbook, Chapter 7, www.azag.gov – Quick Links

Attorney General Opinions – www.azag.gov – Quick Links

Questions/File a complaint:

Arizona Ombudsman-Citizen's Aide (602) 277-7292

File a complaint/Enforcement authority

Attorney General's Open Meeting Law Enforcement Team (602) 542-5025

County Attorney's Office